

MALAYSIA BUILDING SOCIETY BHD**A****v.****DATO' YUSUF SUDIN**

COURT OF APPEAL, PUTRAJAYA

B

ABDUL WAHAB PATAIL JCA

CLEMENT SKINNER JCA

AZIAH ALI JCA

[CIVIL APPEAL NO: W-02-1927-11]

4 DECEMBER 2013

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CIVIL PROCEDURE: *Appeal - Issues not raised in High Court - Settlement agreement - Whether raised as an issue for trial - Whether party exonerated from liability - Whether parties agreed to introduction of new issues - Whether permission of court obtained*

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COMPANY LAW: *Directors - Breach of fiduciary duties - Fraudulent misrepresentation - Whether respondent fraudulently misrepresented approval for joint venture - Whether settlement agreement raised as issue - Whether respondent had knowledge that no approval was given for project - Whether respondent acted dishonestly*

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The appellant, Malaysia Building Society Bhd, brought the appeal against the High Court's decision for dismissing the appellant's claim against its former Chief Executive Officer ('the respondent') for breach of fiduciary duty and breach of trust. The High Court found the respondent liable for breach of fiduciary duty and the appellant had successfully proved its losses against the respondent. However, the learned judge did not enter judgment for the appellant for the damages claimed as she found that the appellant was precluded from doing so by virtue of a settlement agreement which the appellant had entered into with one of its customers, Kembang Biru Sdn Bhd ('Kembang Biru'). The appellant's appeal raised two issues, *ie*, (i) that its settlement agreement with Kembang Biru was never raised as an issue during trial; and (ii) that an interpretation of the settlement agreement in its entirety would show that it was only intended to apply to the relationship between the appellant and Kembang Biru and not to exonerate any third parties who were not parties to the agreement. The respondent cross-appealed and contended, *inter alia*, that the learned judge was wrong to conclude that the respondent had breached his fiduciary duties as a Chief Executive Officer when he fraudulently misrepresented to the Board of Directors ('BOD') that the Board had at a previous meeting granted approval for the appellant's joint venture with Kembang Biru notwithstanding the fact that one or more members of the BOD had actual knowledge of the project.

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A Held (allowing appeal; dismissing cross-appeal)

Per Clement Skinner JCA delivering the judgment of the court:

- B** (1) The parties themselves had not raised the settlement agreement as an issue for trial and neither evidence was led at trial regarding the respondent's exoneration from liability by virtue of the settlement agreement. There was no basis for the respondent to be able to introduce the issue for the first time during his further submissions. It was not open to either party to introduce new issues to be tried unless the parties had agreed to it and the court had given its permission for the same. (paras 19 & 20)
- C** (2) The learned judge erred in law and in fact when she held that the terms of the settlement agreement extinguished the appellant's claim in damages against the respondent. The fact that the appellant had settled its suit with Kembang Biru in respect of its cause of action
- D** founded in contract would not be an answer to the appellant's claim against the respondent for breach of fiduciary duty and breach of trust. The court could not find any provision in the settlement agreement whereby the appellant had agreed to forego or waive the rights it had against the respondent. (paras 33, 39 & 44)
- E** (3) The evidence showed that the respondent had attended the Board of Directors' meeting and was therefore fully aware that no approval had been given for the project by the BOD at the meeting. It was "dishonest" of the respondent to state as a fact that the approval was given at the BOD meeting, amounting to a fraudulent misrepresentation. There is a difference between knowledge of a thing and approval of it. The mere fact that some members of the BOD knew of the project did not equate with their approval of it. For the respondent to say there was approval of the project when to his knowledge there was no such approval was certainly dishonest. (paras 47, 53 & 54)
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Case(s) referred to:

Heaton and Ors v. AXA Equity and Law Life Assurance Society PLC [2002] 2 AC 329 (*refd*)

Jameson and Anor v. Central Electricity Generating Board [2000] 1 AC 455 (*refd*)

H *Ruffino v. Grace Brothers Pty Ltd* [1980] 1 NSWLR 732 (*refd*)

The Kursk [1924] All ER Rep 168 (*refd*)

For the appellant - Tommy Thomas (Nur Ashikin Abdul Rahim with him); M/s Tommy Thomas

For the respondent - Isa Aziz Ibrahim (Darren Malis with him); M/s Ranjit Ooi & Robert Low

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[Appeal from High Court, Kuala Lumpur; Suit No: D5-22-753-2005]

Reported by Lyana Shohaimay

JUDGMENT

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Clement Skinner JCA:

Introduction

[1] We had earlier heard the appeal of Malaysia Building Society Berhad (“the appellant”) against the decision of the High Court, Kuala Lumpur, given on 8 July 2011 wherein the High Court had dismissed the appellant’s claim against Dato’ Yusuf bin Sudin (“the respondent”). We also heard the cross-appeal of the respondent against the decision of the High Court.

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[2] We allowed the appeal and dismissed the cross-appeal. These are our reasons for doing so.

The Facts

[3] The learned judge of the High Court has set out the facts fully in her judgment. It will therefore be sufficient for us to summarise them.

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[4] Before doing so we make this observation. The appellant’s cause of action was founded on the respondent’s breach of his fiduciary duty owed to the appellant, resulting in losses to the appellant. The learned judge found that the respondent was indeed in breach of his fiduciary duty owed to the appellant, and that the appellant had successfully proven its losses arising from such breach of duty. But the learned judge dismissed the whole of the appellant’s claim against the respondent as she found that the appellant was precluded from recovering its losses from the respondent as the appellant had entered into a settlement agreement with one of its customers, Kembang Biru Sdn Bhd (“Kembang Biru”).

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[5] Reverting to the facts now, the respondent served as the chief executive of the appellant from 1 October 1991 to 30 June 2001. The evidence shows that the appellant’s board of directors (BOD) would approve or reject loan applications and take other major business decisions based on materials furnished by the respondent to them.

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[6] On 12 January 1996 Kembang Biru, who planned to undertake a development project in Batu Maung, Penang submitted a proposal to the appellant for financing of its Batu Maung project and to form a joint venture with the appellant for that project (“the said proposals”). After considering the respondent’s board paper on the said proposals, the BOD resolved at its meeting on 22 January 1996 as follows:

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That management to proceed further with the joint venture proposal and submit a paper outlining the development concept, valuation report and Joint Venture Agreement to the BOD for further consideration and approval.

- A [7] The respondent attended that BOD meeting on 22 January 1996 as chief executive. Clearly the BOD did not grant any approval at its meeting of 21 January 1996.
- B [8] Despite being aware of this fact, the respondent caused the appellant to enter into loan agreements with Kembang Biru on 25 March 1996 and subsequently caused the appellant to disburse loan monies totaling RM87,286,155 to Kembang Biru. The respondent also permitted a moratorium on interest of up to four years to Kembang Biru. The appellant's case is that none of these critical decisions, which severely prejudiced the appellant were reported by the respondent to the BOD.
- C In fact the appellant maintains the respondent misrepresented to the BOD in his board paper no. 8 dated 27 June 2001, that an approval was actually given at the 22 January 1996 BOD meeting.
- D [9] The joint venture with Kembang Biru never started. Neither did the proposed development project at Batu Maung. Kembang Biru failed to repay the loan with the appellant, and the loss suffered by the appellant amounted to RM196,737,493.04.
- E [10] On 31 May 2005 the appellant filed this suit against the respondent. It was the appellant's pleaded case that the respondent as chief executive was in a fiduciary relationship with the appellant and in consequence owed fiduciary duties to the appellant which included (i) to act in its interests, (ii) to discharge his duties honestly and in good faith, (iii) to act in a professional, competent and skilful way, (iv) to preserve, protect and promote the interests of the appellant, (v) not to injure or harm the appellant in anyway and, (vi) to avoid any conflict between his duties to the appellant and his private interests. The appellant also pleaded that the respondent as chief custodian of monies belonging to the appellant, acted as trustee of such monies.
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- G [11] It was the appellant's case that the respondent had acted in breach of his fiduciary duty to the appellant and had also acted in breach of his duty as trustee of monies belonging to the appellant, thereby causing the appellant to suffer loss and damage.
- H [12] The respondent's case was that at all times he had discharged his duties with due care and diligence and that at all material times the BOD were fully aware of project with Kembang Biru. The respondent took the position that even if there was no formal BOD approval for Kembang Biru's proposals the BOD were nevertheless fully aware of the project and did not raise queries on it. The respondent also contended that he could not have single-handedly approved and disbursed the loans to Kembang Biru as there were several departments and divisions within the appellant which had their own procedures to comply with before disbursement of monies.
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Litigation With Borrower

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[13] The appellant also commenced separate legal action against Kembang Biru to recover the sums loaned to the latter. This in turn led to Kembang Biru suing the appellant and a subsidiary of the appellant, MBSB Development Sdn Bhd (“MDSB”) who was supposed to be a party to the proposed joint venture. These suits were filed in 2004 and 2006.

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[14] To resolve their disputes, the appellant, Kembang Biru and MDSB entered into a settlement agreement on 3 August 2007 (“the settlement agreement”), whereby Kembang Biru agreed to pay the appellant RM75 million in full and final settlement in consideration of the appellant discharging its charges over Kembang Biru’s lands. Both parties also agreed to discontinue their respective civil suits against each other (“Kembang Biru settlement”).

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The High Court Decision

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[15] On the issue whether the respondent had breached his fiduciary duties to the appellant, the learned judge came to a finding of fact that the respondent had done so. At para. 51 of her judgment the learned judge said:

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[51] In this regard, the court has carefully perused the evidence adduced to consider whether it supports the plaintiff’s contention that the defendant had breached the fiduciary duties with the plaintiff. From the evidence as adduced by the plaintiff’s witnesses, the court finds that it is crystal clear that DW1 (Yusuf) had breached his fiduciary duties to the plaintiff.

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[16] The learned judge also came to a finding of fact that the respondent did not act honestly in the discharge of his duties to the appellant. Towards the end of the respondent’s tenure with the appellant, a company called Sunwaymas Sdn Bhd had written in to propose that the Kembang Biru project lands at Batu Maung be developed jointly by Sunwaymas and the appellant. On 27 June 2001 the respondent prepared and signed board paper no. 8 relating to Sunwaymas’ proposal for the BOD’s consideration. In para. 1 of the paper the respondent stated:

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The board at its meeting held on 22 January 1996 had granted its approval for MDSB to develop several parcel of lands at Mukim 12, Daerah Barat Daya, Batu Maung, Pulau Pinang (“the Project Land”) on a joint venture basis with Messrs Kembang Biru Sdn Bhd *via* equity participation.

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- A [17] In relation to what the respondent had represented to the BOD in board paper no. 8, the learned judge at para. 64 of her judgment said:
- B [64] In this regard, the court accepts the plaintiff's submission that because the defendant was specific in naming the date when he claimed that MBSB had approved the Kembang Biru joint venture, at its 22 January 1996 meeting, he was not truthful in making that statement because no such approval had in fact been granted at the meeting of the BOD on 22 January 1996.
- C [18] After referring to the cross-examination of the respondent where he admitted that the BOD's decision on 22 January 1996 was not a definite decision; that board paper 17 was a preliminary paper and that the BOD did not approve the loan to Kembang Biru, the learned judge at para. 67 of her judgment said:
- D [67] The court finds that the BOD paper no. 8 dated 27 June 2001 on the proposal by Sunway was to jointly develop the project lands was prepared on the defendant's instructions, signed by him and presented to the BOD at its meeting on 28 June 2001. In this regard, the court agrees with the plaintiff's contention that the defendant dishonestly stated in para. 1 of BOD paper no. 8 that the BOD of MBSB had at its 22 January 1996 meeting "granted its approval" to joint venture with Kembang Biru. The defendant knew that this was a fraudulent misrepresentation. It was on reliance of such misrepresentation that the BOD acted at its 28 June 2001 meeting.
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- F [19] After finding that the respondent had breached his fiduciary duties to the appellant, the learned judge then addressed and considered the evidence adduced by the appellant through its assistant general manager (PW5) on the losses it had suffered as a result of Kembang Biru's failure to repay the loans.
- G [20] At para. 76 of her judgment the learned judge came to a finding of fact that:
- [76] Thus, based on the above evidence, the court finds that the losses suffered by the plaintiff pursuant to the disbursements made to Kembang Biru is in the amount of RM196,737,493.03.
- H [21] However, even though the learned judge had found that the appellant had proved its losses of RM196,733,493, she did not enter judgment for the appellant as she went on to consider whether, by virtue of the settlement agreement entered into between the appellant and Kembang Biru, the appellant is precluded from pursuing its claims
- I against the respondent.

[22] After considering the terms in the settlement agreement and case law on the point such as *Jameson and Anor v. Central Electricity Generating Board* [2000] 1 AC 455 and *Ruffino v. Grace Brothers Pty Ltd* [1980] 1 NSW LR 732, the learned judge held that the lesser sum which the appellant agreed to accept was not a partial satisfaction only of its claim in damages. The learned judge said at para. 83 of her judgment that:

[83] ... It was expressly accepted in full and final settlement and satisfaction of all his (*sic*) cause of action in the statement of claim. It (*sic*) would therefore holds (*sic*) that the terms of the plaintiff's settlement with Kembang Biru, extinguished his (*sic*) claim of damages against the other defendant.

[23] The learned judge then dismissed the plaintiffs claim against the respondent with costs.

This Appeal

[24] The appellant took two points in its appeal against the decision of the learned judge regarding the agreement to settle. First, the Kembang Biru settlement agreement was never raised as an issue during trial. Secondly, interpreting the settlement agreement in its entirety will show that it was only intended to apply to the relationship between the appellant, MDSB and Kembang Biru, and not to exonerate any third parties who were not parties to the agreement.

Was The Kembang Biru Settlement An Issue During Trial?

[25] On this point the respondent concedes that it was not an issue during the trial but argues that it was not an issue because both parties accepted the existence of such an agreement, hence the settlement agreement was included in the common bundle of documents under part B and referred to during the cross-examination of both DW1 (the respondent) and PW5. According to the respondent, he was entitled to submit on the meaning of the said agreement and the learned judge was correct in coming to the conclusion that the terms of the said agreement extinguished the appellant's claim against the respondent. The respondent also pointed out that in his defence, he had raised and referred to the settlement agreement which the appellant had entered into. Therefore, he was entitled to raise the point in his submissions before the High Court.

[26] We do not agree with the respondent's contentions. Even though it is true that in his amended defence the respondent had in para. 20 thereof referred to the fact that by entering into a settlement agreement with Kembang Biru, the appellant had entered into a compromise which extinguished any cause of action the appellant may have had against him, the matter did not end there.

- A [27] Before the case came on for full trial, there was case management before the learned judge. Apparently the parties could not agree on a common “list of issues to be tried”, so the record shows that each party filed its own list of issues. It can be seen at vol. 3, record of appeal part A, at pp. 197 to 200, the “list of issues to be tried” which
- B was filed by each party. Neither the appellant nor the respondent identified the Kembang Biru settlement as an issue to be tried. In fact, as pointed out by the appellant in its submissions, there was only one issue in the respondents list, namely;
- C Whether the defendant (“Yusuf”):
- (i) Acted within the terms of his employment; and
- (ii) Whether Yusuf acted in breach of the terms of his employment.
- D [28] The respondent’s witness statement found at pp. 857 to 871 of vol. II, record of appeal does not state that he was entitled to rely on the settlement agreement to exonerate himself from being sued by the appellant. Although the settlement agreement was referred to in the course of the trial, the respondent’s position (in his examination-in-chief at p. 394, vol. 6 record of appeal) was that he was not involved in any settlement negotiations after he left the appellant in 2001. In his cross-examination too the respondent’s position was that he was not aware of the settlement agreement and he was not part of the settlement arrived at.
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- F [29] The witness who gave any sort of evidence relating to the settlement agreement was Tan Chin Kiat (PW5) who was called by the appellant and his testimony related to the execution of the settlement agreement and how the settlement sum that was agreed upon was to be applied to set-off the indebtedness of Kembang Biru. In his cross-examination, although PW5 was questioned on the respondent’s non-involvement in the settlement and the role which the lawyers played in drafting and execution of the settlement agreement, it was never put to PW5 that the terms of the settlement agreement had compromised the appellant’s claim or had exonerated the respondent of all liability towards the net loss of RM196,737,493.04. It is plain for us to see that it was only in the respondent’s “Further Written Submissions” dated 14 June 2011 which was filed in after the conclusion of the trial (at pp. 1658 to 1668, vol. 21, record of appeal) that the question of the respondent’s exoneration by the settlement agreement entered into was raised along with the decision in *Jameson’s* case.
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- I [30] In the circumstances described above, which clearly shows that the parties themselves had not raised the settlement agreement as an issue for trial and neither had any evidence been led at the trial

regarding the respondent's exoneration from liability by virtue of the settlement agreement, we cannot find any basis on which the respondent was able to introduce the issue for the first time during his further submissions.

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[31] In our judgment, given the above facts the learned judge was plainly wrong to allow the respondent to have done so and to accept this issue as the sole ground for denying judgment to the appellant. This is not an instance where the case came up for trial without it having been case managed before by reason whereof the case had proceeded to trial on the basis of the issues raised in the pleadings. Here the parties had themselves identified the issues for trial. Once this had taken place, it was not open to either party to introduce new issues to be tried unless the parties had agreed to it and the court had given its permission for the same, otherwise directions given at case management would be rendered meaningless.

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[32] On this ground alone the appeal should be allowed as the learned judge had found that the respondent was in breach of his fiduciary duties to the appellant and the quantum of loss suffered by appellant had also been proved.

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Is The Appellant Precluded From Claiming Against The Respondent By Virtue Of The Settlement Agreement?

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[33] Even if it can be argued that the respondent should be allowed to raise the issue of the settlement agreement, in our judgment the learned judge had erred in law and in fact when she held that the terms of the settlement agreement extinguished the appellant's claim in damages against the respondent. We find so for the following reasons.

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[34] The respondent relied heavily on cl. 6 of the settlement agreement which states:

The Lender's receipt of the full payment of the Redemption Sum shall constitute full and final settlement of KBSB's indebtedness to the Lender under the Loan Facilities and the Loan Agreements and as secured by the Charged Lands, the dispute between the Lender and KBSB in respect of all the proceedings stated in Recitals E and F and all disputes and/or claims between KBSB and MBSB in relation thereto and both parties shall not have any claim against the other arising therefrom and/or otherwise howsoever ...

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[35] The respondent further relied on the fact that the settlement sum had been fully paid to the appellant. Therefore the respondent argued that (a) since cl. 6 above envisages a situation where there has been a full satisfaction of the amounts disbursed by the appellant to Kembang Biru, and (b) since there has in fact been such satisfaction, the appellant

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A ought not to be allowed to say in this suit that despite there having been a full discharge of Kembang Biru's indebtedness (by the RM75 million payment), that in actual fact a sum of RM196,737,493.04 is still due and outstanding under the very same account.

B [36] In support of his contentions mentioned above, the respondent relied on the *Jameson's* case. The learned High Court Judge accepted the respondent's contentions based on what was said in *Jameson's* case. That was a case involving a claim against concurrently tortfeasors (ie, several tortfeasors causing the same damage) but the dispute was resolved or settled with one of them. The learned judge relied on that passage of the judgment of Lord Clyde in *Jameson's* case at p. 483 where the learned judge explained that in some cases where a plaintiff has made a claim for damages, the value of the claim may not correspond with the quantification of the loss and injury which is claimed. This is because there is always an element of uncertainty in each case. For example, whether the defendant's liability can be proven or whether the defendant is financially able to pay if liability is established, are matters of uncertainty. As such a plaintiff may be willing to negotiate to settle his claim at a figure which does not represent the full value of the claim, after making an assessment of the various factors. Lord Clyde then said:

... Such settlements are of course to be encouraged. If, as ought to be the case, the figure is reached after an arm's length negotiation, it can reasonably be assumed that the figure finally agreed upon does represent the full value of the claim ...

F What is then agreed and paid is a sum which represents the full value of the claim so that the indebtedness is thereby extinguished. What is paid is the present value of a possible future award. So it does not seem to me that in the ordinary case after settlement has been made and satisfied with the one defendant there can be a balance of the claim which is recoverable from another possible defendant. What the parties must be seeking to achieve is a conclusion to their respective rights and liabilities so as to extinguish them altogether for the future.

G [37] In our judgment the case of *Jameson* was not of any particular assistance to the respondent in this case. In that case Lord Hope of Craighead said at p. 476, in relation to a settlement agreement arrived at between parties:

The intention of the parties is to be found in the words of the settlement. The question is one as to the objective meaning of the words used by them in the context of what has been claimed.

I [38] To arrive at the true meaning of the words appearing in and the intention of the parties in signing it, the settlement agreement must be read as a whole. Here the respondent and the learned judge relied on

the words in cl. 6, but those words must be looked at objectively in the context where the only parties to the settlement agreement were the appellant, MDSB and Kembang Biru – the respondent was not a party to it and the causes of action relied upon by the appellant against the respondent are totally separate, different and distinct from that taken against Kembang Biru, in that, the appellant's cause of action against Kembang Biru is for breach of contract (as defaulting customer) whereas against the respondent, it is for breach of fiduciary duty and for breach of trust (as defaulting chief executive). In *The Koursk* [1924] All ER Rep 168 the English Court of Appeal held that where the negligent parties were not joint tortfeasors of the same tort, a judgment against one tortfeasor did not bar an action against the other tortfeasor. In that case the ship Itria was damaged by two other vessels, namely, the Koursk who deviated from her course and came into the path of Itria, while the ship Clan Chisholm failed to reverse her engines and came into collision with the Itria. Bankes LJ said at p. 173:

The damnum no doubt is only one, and the act of negligence of each contributed to that damnum, but the acts of negligence are still, in my opinion, separate. There is no possible connection between them. They began, they continued and they ended as separate acts; they never became a joint act.

[39] In the same case Scruton LJ said at p. 176:

In my view, the Koursk and the Clan Chisholm were not joint tortfeasors of the same tort, but separate tortfeasors of two different torts, and, therefore at common law judgment against one in respect of the cause of action against it would not be an answer to a claim against the other in respect of the different cause of action on which it was sued.

So too in this present case. The fact that the appellant had settled its suit with Kembang Biru in respect of its cause of action founded in contract would not be an answer to the appellant's claim against the respondent for breach of fiduciary duty and breach of trust.

[40] In our judgment, a good indication that it was not the intention of the parties who entered into the settlement agreement that the payment of the redemption sum would extinguish the appellant's claim against any other party is amply provided by the fact that the appellant had expressly reserved all its rights in the matter under cl. 20 of the settlement agreement which reads:

20. All of the Lender's (MBSB) rights and interests in this matter are hereby reserved in full.

A [41] In our view the intention of the parties in inserting cl. 20 above must be viewed against the fact that by 3 August 2007 when the settlement agreement was entered into, the appellant had already commenced this action against the respondent based on a completely distinct and separate cause of action to that against Kembang Biru and hence the express reservation of the appellant's rights.

B [42] In our judgment, on a proper reading of cls. 1, 4, 6 and 20 of the settlement agreement the intention of the parties in entering into the same was for: (i) recovering monies from Kembang Biru, (ii) discharging the appellant's (MBSB's) charges on the lands in dispute and (iii) withdrawing the ongoing proceedings taken against each other ie, the appellant, MDSB and Kembang Biru. In our view the settlement agreement only bars the appellant from proceeding against Kembang Biru for the shortfall or other claims in their lender/customer relationship. The settlement agreement did not extinguish the appellant's causes of action against the respondent.

C [43] In support of what we have said we refer to the House of Lords decision in *Heaton and Ors v. AXA Equity and Law Life Assurance Society PLC* [2002] 2 AC 329 where Lord Bingham considered the *Jameson's* case and observed:

E My Lords, the issue in this appeal may be expressed in this way: If A, having sued B for damages for breach of contract, enters into a settlement with B expressed to be in full and final settlement of all its claims against B, is A thereafter precluded from pursuing against C a claim in damages for breach of another contract to the extent that this claim is for damages which formed part of A's claim against B? Expressed in another way, the issue is whether the majority decision of the House in *Jameson v. Central Electricity Generating Board* [2000] 1 AC 455, properly understood, laid down any rule of law and, if so, whether that rule applies to successive contract-breakers as well as concurrent tortfeasors. In considering whether a sum accepted under a compromise agreement should be taken to fix the full measure of A's loss, so as to preclude action against C in tort in respect of the same damage, and so as to restrict any action against C in contract in respect of the same damage to a claim for nominal damages, the terms of the settlement agreement between A and B must be the primary focus of attention, and the agreement must be construed in its appropriate factual context. In construing it various significant points must in my opinion be borne clearly in mind:

F (1) The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor and the release of one contract-breaker does not have the effect in law of releasing a successive contract-breaker.

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- (2) An agreement between A and B will not affect A's right against C unless either (a) A agrees to forgo or waive rights which he would otherwise enjoy against C, in which case his agreement is enforceable by B, or (b) the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party ...

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[44] As we indicated earlier, we have construed the relevant terms of the settlement agreement in its appropriate factual context and we cannot find any provision in that agreement whereby the appellant had agreed to forego or waive its rights which it had against the respondent.

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[45] For all the above reasons we would allow the appellant's appeal. We accordingly set aside the decision of the High Court and substitute it with a judgment in favour of the appellant in the sum of RM196,737,493.04 together with interest thereon at 4% per annum for the date of judgment on 8 July 2011 until full payment.

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The Cross-appeal

[46] The respondent contends that the learned judge disregarded evidence adduced or the trial which disclosed that the respondent relied on resolution no. 2335 of the BOD (ie, the BOD resolution of 22 January 1996 which was set out earlier in this judgment) which, in the respondent's own mind, gave an approval in principal for the appellant to proceed with the Kembang Biru project.

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[47] We find no substance in this ground. We cannot see on what basis the respondent could have reached the conclusion in his own mind that the BOD resolution of 22 January 1996 was an "approval in principal" when the resolution itself makes no mention or reference to such words or words to the like effect. In fact the BOD resolved at its meeting of 22 January 1996 that management must submit further documents for the BOD's "further consideration and approval". Clearly the documentary evidence shows that the respondent had no basis to regard the resolution as an "approval in principal" as the respondent tries to make out.

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[48] The respondent also contended that the evidence adduced at the trial shows that the members of the appellant's BOD were aware of the transactions involving Kembang Biru and that the other divisions and departments within the appellant, such as the Operations and Legal and Secretarial Division were assisting the respondent and therefore the respondent could not have single handedly approved and disbursed the loans to Kembang Biru. According to the respondent the learned judge disregarded such evidence.

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- A [49] We do not agree. A reading of her judgment shows that the learned judge was very much aware of the evidence the respondent was referring to. At p. 83 vol. 1, record of appeal, the learned judge referred to the questions put to PW1 Tan Sri Sallehudin Mohammad in his cross-examination regarding the state of knowledge of the BOD regarding the transaction with Kembang Biru. PW1 was asked:
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[Q] (Question repeated) Would the BOD, in the nature of your goodself and the other members of the BOD, would you be interested to know the progress of something that has not been approved by the BOD.

- C [A] Because the BOD, if you look at the decision, the papers itself prepared by the chief executive says that it is seeking for approval in principal because there was no adequate information to make a decision on this major issue. So, the BOD agreed to proceed further, and came back to the BOD for further deliberation and approval. But the chief executive did not come back to the BOD with a proper paper for a decision. A big difference there. Unless and until the chief executive brought up again to the BOD for decision a thoroughly comprehensive paper to convince BOD on the viability of the project, the BOD will never make a decision.
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- E That is what I meant by "all these members of the BOD they are very competent people".

- [50] The point being made by PW1 in the above cross-examination was that while the BOD was aware of the proposal by Kembang Biru, the BOD will never make a decision on the proposal without the proper papers being before the BOD. As pointed out by PW1, there is a big difference between knowing about a proposal and the approval of it by the BOD.
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- [51] With regard to the evidence about other divisions and departments in the appellant giving their approval and assisting the respondent to disburse the loans to Kembang Biru, the learned judge was again fully aware of such evidence and said in her judgment at p. 85 of the record of appeal that:
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- H Thus, the defendant was solely delegated with the task of managing the business of MBSB on a day to day basis. In fact, he accepted in his evidence that the "buck stopped at his office". In my view, even though the relevant department may have recommended to him for approval but it is his responsibility or burden to ensure that such matter is brought to the BOD for prior approval before the final approve such matter.
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Clearly in our view, the learned judge had not ignored the role played the other departments in the appellant as alleged.

[52] The respondent also complained that the learned judge was wrong to conclude that he had breached his fiduciary duties as chief executive when he fraudulently misrepresented to the BOD at its meeting of 28 June 2001 that the BOD had at its meeting of 22 January 1996 granted approval for the joint venture with Kembang Biru, notwithstanding the fact that at all material times, one or more members of the BOD had actual knowledge of the project. We find no merit in this complaint.

A

B

[53] In our judgment the learned judge was correct in her finding that the evidence shows that the respondent attended the BOD meeting of 22 January 1996 and was therefore fully aware that no approval had been given for the project by the BOD at that meeting. Yet the respondent had stated as a fact in his board paper no. 8 that such approval had been given at the BOD meeting of 22 January 1996. As the learned judge said in her judgment at p. 84, record of appeal vol. 1, this was a “dishonest” statement, made by the respondent that amounted to a fraudulent misrepresentation. We agree with the learned judge. There is a difference between knowledge of a thing and approval of it. The mere fact that some members of the BOD knew of the project does not equate with their approval of it. For the respondent to say there was approval of the project when to his knowledge there was no such approval was certainly dishonest.

C

D

E

[54] To conclude, the matters raised by the respondent in his cross-appeal were essentially challenges to the findings of fact made by the learned trial judge. We find no reason to interfere with such findings which were fully supported by the evidence which she referred to in arriving at such findings. The same may be said about the learned judge’s finding that the respondent was in breach of his fiduciary duty to the appellant.

F

[55] For all the above reasons we dismissed the respondent’s cross-appeal.

G

[56] With regard to costs, we awarded costs of RM80,000 to the appellant here and below. Deposit to be refunded.

H

I